(25,466)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 636.

WILLIAM RAYMOND, PLAINTIFF IN ERROR,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 20, 1916.

* * * * * * *

a-2 *Complaint.*

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2781.

WILLIAM RAYMOND, Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

Plaintiff complains of the defendant, and for a cause of action, alleges:

I.

That Plaintiff is a citizen of the United States and of the State of Washington and prior to the 16th day of April 1914, Plaintiff was a strong, healthy, and vigorous young man of the age of Twenty-five (25) years, with good hearing and eyesight, and earning and able to earn good wages at mining and other kinds and classes of labor.

II.

That the Defendant, Chicago, Milwaukee & St. Paul Railway Company is a foreign corporation authorized to do business and doing business in the State of Washington as a common carrier railroad corporation, and at all times hereinafter mentioned, said defendant was engaged in the operation of an interstate railroad between the City of Seattle in the State of Washington, and the City of Chicago in the State of Illinois, with branch lines running into many cities and states, and said Defendant is engaging as such common carrier railroad in interstate and foreign commerce.

3 III.

That on or about said 16th day of April 1914, the Defendant was engaged in straightening out its main railroad line and cutting down the grades thereon so as to better facilitate the movement of interstate and foreign commerce between said City of Seattle in the State of Washington, and said City of Chicago in the State of Illinois, and other cities and states, and at said time Plaintiff was employed by the Defendant in said work of driving a tunnel to improve and better the roadbed between Horrick's Spur and Rockdale, on the Defendant's main railroad line, and at said time and place and by said work, the Defendant was engaged, and Plaintiff was employed by said Defendant in the work of improving, altering, repairing,

straightening out, and bettering the roadbed, and cutting down the grades on the Defendant's said Railroad, so as to facilitate and make less difficult and expensive and more easy, secure, expeditious and efficient the operation of freight and passenger trains on the Defendant's said railroad line in the carriage of both passengers and freight in interstate and foreign commerce and the work of Defendant, and Plaintiff's labor thereon, were acts and things incident to and made necessary for the constant, continuous and better operation of defendant's said trains in the carrying on of its business of interstate commerce by railroad and in work incident to such commerce and as a necessary part thereof.

IV.

That while Plaintiff was so engaged for the Defendant in such work, the Defendant carelessly and negligently used and caused to be used rotten and defective fuse, powder and dynamite and caused and allowed an unexploded charge or blast of dynamite to be
4 concealed, hidden and covered from the view or knowledge of Plaintiff at said time and place where Plaintiff was put to work, and the bosses and foreman in charge of said work for the Defendant at said time and place were careless and incompetent in the discharge of their duties, which was known, or by the exercise of ordinary care should have been known to the Defendant, and the Defendant, acting by and through such careless and incompetent bosses and foreman, caused and allowed said unexploded charge or blast of powder or dynamite to be and remain at and in the place where the Defendant required Plaintiff to do his work, and said Defendant, through said bosses and foreman, assured Plaintiff that said place where Plaintiff was required to work, was safe and secure and free from any danger, and that there were no unexploded charges or blasts of powder or dynamite in or around or about said place where the Defendant required Plaintiff to work at said time.

V.

That while Plaintiff was so at work for the Defendant, and without any notice or warning whatever, and on assurance from the Defendant, as aforesaid, that said place where Plaintiff was required to work at said time was safe and free from danger, Plaintiff was proceeding about his work in the regular and ordinary manner, and without negligence on his part, struck his pickax into an unexploded charge or blast of powder or dynamite, which at said time and place was concealed and hidden from the view or knowledge of Plaintiff, but which was known, or by the exercise of ordinary care, should have been known to the defendant, and said charge or blast of powder or dynamite exploded in front of Plaintiff and shot large pieces of gravel, stone, dirt, and other materials and substances into Plaintiff's face and neck and breast and arms and legs, and Plaintiff's left leg was broken, and he was injured, lacerated and
5 cut in many parts of the body, and both of Plaintiff's eyes were shot out and entirely destroyed and Plaintiff's whole face

and body were disfigured and deformed, and Plaintiff was badly injured internally and was made partially deaf and totally blind and will always be totally blind as long as he lives and from all of said injuries Plaintiff suffered, and always will suffer, great pain, humiliation and mortification to his damage as hereinafter stated.

VI.

That from the injuries which Plaintiff received as aforesaid, through the negligence of the Defendant as aforesaid, Plaintiff has been made a helpless and hopeless mental and physical human wreck, and Plaintiff always will be helpless and hopeless as long as he lives and Plaintiff never again will be able to earn the wages he formerly could or any wages, and Plaintiff has incurred and always will incur large expenses for his care and keeping, and Plaintiff will always have to be fed like a baby by someone else, and Plaintiff will have to pay and incur large sums for such care and attention, besides the care and attendance of doctors and nurses, and Plaintiff has been damaged in all in the sum of Seventy five thousand ($75,000.00) Dollars from all of such injuries through the negligence of the Defendant as aforesaid.

VII.

That all of said injuries to Plaintiff resulted entirely through the fault, carelessness and negligence of the Defendant and through the fault, carelessness and negligence of their servants, agents and employees for which Defendant is responsible, and not through any act, deed, omission or fault on the part of Plaintiff, and in seeking to recover damages herein for said injuries Plaintiff claims the benefit of the Act of Congress of April 22, 1908, relating to the lia-
6 bility of common carrier railroad corporations to their employees, and all other laws and constitutional provisions which are applicable in the premises.

Wherefore, Plaintiff asks for judgment against the Defendant for the sum of Seventy five thousand ($75,000.00) Dollars, and for his costs and disbursements in this action.

JOHN T. CASEY,
Plaintiff's Attorney.

STATE OF WASHINGTON,
County of King, ss:

William Raymond, being first duly sworn, on oath says: That he is the Plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

BILLY RAYMOND.

Subscribed and sworn to before me this *30th* day of July 1914.

J. T. CASEY,
Notary Public in and for the State of Washington, Residing at Seattle.

Indorsed: Complaint. Filed in the U. S. District Court, Western Dist. of Washington, July 1, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

7 *Substituted Answer.*

United States District Court, Western District of Washington, Northern Division.

No. 2781.

WILLIAM RAYMOND, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

Comes now the defendant, the Chicago, Milwaukee & St. Paul Railway Company, and, by way of substituted answer, in place of the one now on file, to the complaint of the plaintiff, served and filed herein, states and alleges as follows:

I.

1. Answering paragraph one thereof, said defendant denies any knowledge or information sufficient to form a belief as to each and every allegation therein contained.

2. Answering paragraph two thereof, said defendant admits the allegations therein contained.

3. Answering paragraph three thereof, said defendant denies each and every allegation therein contained, except it admits that the said plaintiff, on the 16th day of April, 1914, was employed by the said defendant in the work of driving a tunnel.

4. Answering paragraph four thereof, said defendant denies each and every allegation therein contained.

5. Answering paragraph five thereof, said defendant denies each and every allegation therein contained, except it admits that plaintiff, while working for the defendant in the construction of
8 said tunnel, received personal injuries, from a cause which is not fully known to this defendant.

6. Answering paragraph six thereof, said defendant denies each and every allegation therein contained.

7. Answering paragraph seven thereof, said defendant denies each and every allegation therein contained.

II.

Further answering said complaint and as a first affirmative defence thereto, said defendant states that whatever injury, if any, the said plaintiff received while working for the said defendant in the construction or boring of said tunnel, was proximately due to his own act in failing to make a proper inspection of the place and ground where he was put to work; that it was the duty of the said

plaintiff to make his own inspection and observe his own surroundings in reference to anything which might harm or injure him while in the progress of his said work, and that had plaintiff so observed his duty as an employe in reference to investigating the things which would or did injure him while at work in said tunnel, the said injury of which he now complains would not and could not have occurred; that plaintiff well knew and understood when he went to work in said tunnel that he would encounter the very risk of injury which unfortunately befell him; that because of such understanding and the nature of the work and his duty to observe his own place where he was put to work, as to whether it was safe or unsafe, said plaintiff assumed all risk of injury from any cause or from the cause which he alleges brought about his injury.

III.

Further answering said complaint and as a second affirmative defense thereto, said defendant states and alleges as follows:

9 That it is a common carrier corporation, engaged in interstate and intrastate commerce, with a line of railroad running from the city of Chicago in the State of Illinois to the city of Seattle in the State of Washington; that the said main line of railroad across the State of Washington was constructed in the year 1908 and its route crossed, and now crosses, the Cascade Mountains through and over what is known as the Snoqualmie Pass, and is constructed on the summit of said mountains or pass without the aid of a tunnel and no tunnel of any consequence exists along the line of the said railroad of said defendant as it passes over the Cascade Mountains in King County, Washington, where the alleged accident to the said plaintiff occurred; that said railroad over said mountains has been in operation as a through highway of interstate commerce since the year 1908 and is now in continuous operation as such; that in the year 1913 this defendant commenced the construction of a tunnel through the Cascade Mountains, the location of which tunnel is off the main line of defendant's railway and wholly disconnected therefrom, and the work of constructing said tunnel in no manner impedes, stops or interferes with the operation of the defendant's trains engaged in interstate commerce over and along its present main line of railroad; that the exact location of said tunnel is shown upon a blue print map and survey thereof hereto atached and marked "Exhibit A" as part of this answer; that the entire length of said tunnel through said mountains, when completed, will be about fourteen thousand feet, and the outside boundaries thereof are, on said blue print, between the points East Portal and West Portal; that the means used by the said defendant in the construction and boring of said tunnel are those ordinarily employed in tunnel work, to wit, boring, blasting, pick and shovel work, and the carting of the material from the hole by means of dump cars hauled by mules or horses; that said

10 plaintiff, at the time of his said alleged injury, was working as a common laborer with a pick and shovel within said par-

tially bored tunnel, in connection with loosening the earth and rock and material, for the purposes of carrying or carting the same from the partially bored hole of said located tunnel; that he was at said instant of time working in the east end of said located tunnel, which, at that time, was bored into the mountain about one thousand feet; that at the point in the bore of said tunnel where plaintiff was working and where he received his injury, and in all other parts thereof, there was no railway track or track-, for the carriage of interstate commerce, or commerce of any kind, constructed, and no railway engaged in any kind of commerce operated into said bore of the tunnel or up to the place where said plaintiff worked and where he received the alleged injury; that the reason why no commerce of any kind was carried on at the point where plaintiff worked and where he received his alleged injury, or at any other point connected with the boring of said tunnel, was, that said tunnel was incomplete for any service which might or could be performed by the operation of a railroad; that it was in the process of construction, being only partially bored into said mountain, making it physically impossible for any train, cars or engines to operate into the said partially bored tunnel; that the sole employment of the said plaintiff with the said defendant and the whole work that he performed while in its employ, was that of a common laborer with pick and shovel, in assisting the boring or driving of the said located tunnel.

That said tunnel is as yet and down to this date far from completion for the operation of trains carrying commerce through the same; that when the same is completed it will be a part of defendant's said main line of railroad between Seattle, Washington and Chicago, Illinois, defendant will construct a railway track through the same and will operate trains thereover and will, by means of said trains, carry freight and passengers from the State of
11 Washington to other states and from other states through the State of Washington to the city of Seattle and other points bordering on Puget Sound.

Wherefore, and by reason of the premises, the said plaintiff is not entitled to recover under the Act of Congress of April 22nd, 1908 and the amendments thereto, as declared upon in paragraph seven of his said complaint and other paragraphs therein.

IV.

Further answering said complaint, and as a third affirmative defence thereto, said defendant states and alleges that this Court is without jurisdiction to hear and determine the claims made by the said plaintiff in his said complaint in this:

That the work in which the plaintiff was engaged at the moment when he received his injury was that of a common laborer in removing earth and material with pick and shovel in the construction of a tunnel through the Cascade Mountains, which said tunnel at the time was disconnected from the main line of the said defendant's right of way and railroad track over which it was at the time operating trains in interstate commerce; that said tunnel at

said time was incomplete and but partially constructed or bored and physically so situated that railway trains could not and were not operating into any portion of the partially bored tunnel; that the construction of said tunnel was wholly disconnected from, and in no manner interfered with, the trains of the said defendant, and in no manner was made use of by said defendant in the transportation of interstate or other commerce; that the work in which the said plaintiff was engaged at the instant he received his injury, and at all times prior thereto while working for the said defendant, was what is commonly known as tunnel work, or hazardous underground work; that in the year 1911 the Legislature of the State of
12 Washington (Chap. 74, Laws 1911) passed an Act relating to the compensation of injured workmen in certain industries, and, in particular, injured workmen engaged in the hazardous occupation of constructing tunnels and railroads; that said compensation so provided was and is in lieu and stead of any other remedy said employe may have, to recover compensation for his personal injury; that said remedy so provided by said Act is made exclusive; by express provision therein all civil actions and civil causes of action, for personal injuries received in the construction of tunnels, or tunnels for railroads, and all jurisdiction of the courts of the State over such causes of action, were and are abolished; that the work in which said plaintiff was engaged at the time he received his injury, was, and is, such hazardous work as contemplated by and embraced within the said Act of said Legislature; that the said Act, since its enactment down to this date was and is in full force and effect; that, in pursuance of the specific provisions of said Act and the power conferred upon the State of Washington thereby, said defendant, during all the time since the commencement of the construction of said tunnel down to date, has been assessed its proportionate share of the necessary fund or funds required by said Act to cover all claims made for personal injuries of persons engaged in work of the class to which plaintiff belongs, and said defendant has always paid to the State of Washington all premiums or sums due or levied against it for that purpose; that said plaintiff was within said Act and classified as a tunnel man, and was included within the class mentioned in said Act as tunnel men or tunnel work; that all payments or premiums due from the said defendant to the State of Washington at the time said plaintiff received his alleged injury have been fully paid, and said defendant was not, at the time said plaintiff was injured, or at any other time since the commencement by it of the construction of said tunnel, and is not now, in default as to any premium or payment due and owing from it to the said State of Washington,
13 under and by virtue of the provisions of said Act; that it has always complied, and is now complying, with each and every one of the provisions of said Act relating to, and controlling, the particular work of the construction of said tunnel and the compensation to be made to the employes receiving personal injury while working therein.

Wherefore, and by reason of all the premises, the said plaintiff, by the express terms of said Act and the particular work he was at

the time performing, has no cause of action against said defendant, has no right to maintain this suit in this Court, and this Court is without jurisdiction to permit said suit to be instituted and finally determined.

Defendant prays that said action be dismissed and that it have judgment against said plaintiff for all costs and disbursements incurred herein.

GEO. W. KORTE,
Attorney for Defendant,
608 *White Building, Seattle, Washington.*

14 STATE OF WASHINGTON,
County of King, ss:

George W. Korte, being first duly sworn, on oath says:

That he is the Attorney for the defendant in the foregoing action and is authorized to verify this answer for and on behalf of said defendant corporation; that he has read the foregoing answer, knows its contents, and that the statements therein contained are true as he verily believes.

GEO. W. KORTE.

Subscribed and sworn to before me this 2d day of December, A. D. 1914.

[SEAL.] F. M. BARKWILL,
Notary Public in and for the State of Washington, Residing at Seattle, Therein.

(Here follows diagram marked page 15.)

MAP

TOO

LARGE

FOR

FILMING

16 Indorsed: Substituted Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 10, 1914. Frank L. Crosby, Clerk. B. E. M. L., Deputy.

17 *Substituted Reply.*

United States District Court, Western District of Washington, Northern Division.

No. 2781.

WILLIAM RAYMOND, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

By way of substituted reply, in place of the one now on file, the plaintiff alleges as follows:

I.

Answering the first affirmative defence of the defendant's answer, plaintiff says:

The plaintiff denies that the injuries he received were proximately due to his own act in failing to make a proper inspection of the place and ground where he was put to work, or that he assumed the risk, as stated in the first affirmative defence, or otherwise at all.

II.

In answer to the second affirmative defence of said answer, plaintiff admits that the said tunnel is only partially constructed and when completed will be used for the carriage of interstate commerce, and that its location is as set forth in said second affirmative defence and the blue print, Exhibit A, attached to the said answer; but plaintiff denies that the said matters set forth in said second affirmative defence constitute any defence to the plaintiff's said cause of action stated in his said complaint.

III.

18 In answer to the third affirmative defence, contained in paragraph four of the defendant's answer, plaintiff denies that this court is without jurisdiction, but admits that the said tunnel is only partially constructed and when completed will be used, for the carriage of interstate commerce, and that its location is as set forth in said third affirmative defence and the blue print, Exhibit A, attached to the said answer, but plaintiff denies that the said matter constituted any defence to plaintiff's said cause of action stated in his said complaint.

Plaintiff admits the matter and allegations contained therein

respecting the compliance by the defendant with the laws of the State of Washington, Chapter 74, Laws of 1911, relating to the compensation of injured workmen engaged in the occupation of constructing tunnels and the work of constructing the particular tunnel in question at the time plaintiff received his said injury, but plaintiff denies that such compliance with said laws and the payment by defendant of the assessments thereunder for the particular tunnel work in question is any defense to the cause of action set forth in the complaint.

Wherefore, plaintiff asks for judgment as prayed for in his complaint.

JOHN T. CASEY,
Attorney for Plaintiff,
440 *New York Block, Seattle, Washington.*

STATE OF WASHINGTON,
County of King, ss:

John T. Casey, being first duly sworn, on oath says: That he is the Attorney of record for the plaintiff in the foregoing action; that he is authorized to verify this Reply for and on behalf of said plaintiff; that he knows the facts involved in said pleading, knows its contents, and the statements therein contained are true as he verily believes.

JOHN T. CASEY.

Subscribed and sworn to, before me this 2nd day of December, A. D. 1914.

[NOT. SEAL.] F. M. BARKWILL,
Notary Public in and for the State of Washington, Residing at Seattle, Therein.

19–21 Service admitted and copy received Dec. 2, 1914.
GEO. W. KORTE,
Att'y for D'f't.

Indorsed: Substituted Reply. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 10, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

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22 *Order and Judgment of Dismissal.*

In the United States District Court for the Western District of Washington, Northern Division.

No. 2781.

WILLIAM RAYMOND, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

The motion of the defendant, the Chicago, Milwaukee & St. Paul Railway Company, for a judgment of dismissal on the pleadings, having come on before the above entitled court for hearing and disposition, the plaintiff appearing by his attorney, John T. Casey, and the defendant appearing by his attorney, Geo. W. Korte, the same having been submitted to the court upon oral argument and briefs of the respective attorneys, the court being duly advised in the premises,

Orders that said motion be, and the same is hereby, sustained and that said defendant is entitled to a judgment of dismissal upon the facts as they appear from the pleadings on file in said cause.

In accordance with the said order, it is further considered, ordered and adjudged, that the above entitled action be, and the same is hereby, dismissed, and that said defendant shall have and recover of the said plaintiff its costs and disbursements incurred herein in the sum of —.

The plaintiff excepts to the foregoing order and judgment of dismissal, and to the whole thereof, and his exceptions are hereby allowed by the Court.

Done in open Court, December 10th, 1914.

JEREMIAH NETERER, *Judge.*

Received a copy—

JOHN T. CASEY,
Pl'ff's Att'y.

O. K.

GEO. W. KORTE,
For D'f't.

23 & 24 Indorsed: Order and Judgment of Dismissal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 10, 1914. Frank L. Crosby, Clerk, By E. M. L., Deputy.

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25 *Assignment of Error.*

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2781.

WILLIAM RAYMOND, Plaintiff in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant in Error.

Comes now the Plaintiff, William Raymond, and files the following Assignment of Error upon which he will rely in his prosecution of his Writ of Error in the above entitled cause, in the United States Circuit Court of Appeals for the Ninth Circuit, for relief from the judgment rendered in said cause dismissing said action.

1. The Honorable District Court erred in granting the motion of the defendant for judgment on the pleadings in the above entitled cause.

Wherefore, Plaintiff, Plaintiff in Error, prays that the said Judgment of Dismissal on the pleadings of the Honorable District Court for the Western District of Washington, Northern Division, be reversed and that directions be given that Plaintiff may have a trial on the merits of said cause and that full force and efficiency may inure to the Plaintiff by reason of his prosecution of said cause.

JOHN T. CASEY,
Plaintiff's Attorney.

Due service of the foregoing Assignment of Error admitted this 24th day of December, 1914.

GEO. W. KORTE,
Defendant's Attorney.

26–46 Indorsed: Assignment of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 28, 1914. Frank L. Crosby, Clerk, By Ed. M. Lakin, Deputy.

47 * * * * * * *

Opinion U. S. Circuit Court of Appeals.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2544.

WILLIAM RAYMOND, Plaintiff in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant in Error.

John T. Casey, for the Plaintiff in Error.
Geo. W. Korte, for the Defendant in Error.

Before Gilbert and Ross, Circuit Judges, and Rudkin, District Judge.

GILBERT, *Circuit Judge:*

The plaintiff in error in his complaint in the court below alleged that he was an employe of the defendant in error, and was engaged in the work of driving a tunnel to improve and better the roadbed on the defendant's main railroad line so as to facilitate and make less difficult and expensive, and more easy to secure expeditious and efficient operation of freight and passenger trains on the defendant's line, in the carriage of freight and passengers in interstate commerce. From the pleadings it appeared that the tunnel when completed would be about 14,000 feet in length, and that the plaintiff was engaged therein as a common laborer with a pick and shovel, the
48 tunnel being intended to shorten the line which at the time ran over the mountain through which the tunnel was located. The defendant in error filed a motion for a judgment on the pleadings, on the ground that it affirmatively appeared therefrom that the complaint was based upon the Federal Employers' Liability Act, that at the time when he was injured the plaintiff was not employed or engaged in interstate commerce so as to bring his services within the terms of the Act ,and on the further ground that the court was without jurisdiction of the action on account of the act of the Legislature of the State of Washington, (Chap. 74, Laws of 1911), relating to the compensation of injured workmen, engaged in tunnel work, in force in that state. The motion was sustained, and a judgment was entered for the defendant in error, dismissing the action.

The plaintiff in error contends that from the pleadings it appears that the work in which he was engaged was interstate commerce, and that the cause of action is within the terms of the Federal Employers' Liability Act. He relies principally upon the case of Pedersen v. Del., Lack. & West. R. R., 229 U. S. 146, and contends that the facts in that case as they are stated in the District Court, 184 Fed. 737, and in the Circuit Court of Appeals, 197 Fed. 537, are similar to the facts in the case at bar. In the District Court it is stated in the opinion in that case that at the time of the plaintiff's injury, the

defendant was engaged in building an additional track, part of which was to be laid on a bridge, and that the plaintiff was hurt while upon the uncompleted structure, and while carrying material from
49 one part of the work to another. In the Circuit Court of Appeals the statement was made that the plaintiff "was an iron worker on a bridge on which an additional track was being placed." In both of those courts it was held that the plaintiff was not engaged in interstate commerce. But in the Supreme Court the facts are stated differently. There it is said that "on the afternoon of his injury the plaintiff and another employe, acting under the direction of their foreman, were carrying from a tool car to a bridge known as the Duffield bridge, some bolts or rivets which were to be used by them that night or very early the next morning, in repairing that bridge, the repair to consist in taking out an existing girder and inserting a new one. The bridge could be reached only by passing over an intervening temporary bridge at James Avenue. These bridges were being used in both interstate and intrastate commerce. While the plaintiff was carrying a sack of bolts or rivets over the James Avenue bridge, on his way to the Duffield bridge, he was run down and injured by an intrastate passenger train." It was on that statement of the facts that the court reversed the decision of the lower courts, and held that the plaintiff was engaged in interstate commerce within the provisions of the Federal Employers' Liability Act. In considering the question the court said: "Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature
50 of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. * * * We are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used, is so closely related to such commerce as to be in practice and in legal contemplation a part of it." We think there is a clear distinction between the facts in that case and those in the case at bar. The plaintiff in error here was engaged in constructing a new instrumentality. When completed it was intended to be used in interstate commerce, but as yet it was no part of the railroad line of the defendant in error, and it had not become an instrumentality in interstate commerce. To the state of facts which is here presented on the pleadings, the language of the Supreme Court in the Pedersen case is applicable. The court said: "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * Of course we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have

become such instrumentalities, and during their use as such." The present case is similar to Bravis v. Chicago, M. & St. P. Ry. Co., 217 Fed. 234, in which the Circuit Court of Appeals for the Eighth
51 Circuit held that an employe engaged in the construction of a bridge 600 feet distant from the railroad on a cut-off more than a mile in length, and which had never been provided with rails or used as a railroad, is not employed in interstate commerce, although his employer is so engaged, and intends to use the cut-off when completed. The court said: "The mere fact that it was the purpose and intention to use it at some future time did not make it an instrumentality of interstate commerce. That purpose and intention might be changed and it might never be used in interstate commerce, or at all. The argument that the building of the cut-off was the mere correction or prevention of a defect or insufficiency of the defendant's instrumentality for conducting interstate commerce is too remote and inconsequentual to convince."

It is contended that even if the allegations of the complaint fail to bring the case within the Federal Employers' Liability Law, they sufficiently alleged a common law cause of action against the defendant, and for that reason it was error to enter a judgment against the plaintiff on the pleadings.

The statute of Washington of 1911, Page 345, entitled "An Act relating to compensation of injured workmen", declares that the common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions, economically unwise and unfair, that the remedy of the workman has been uncertain, slow, and inade-
quate, and that the State of Washington, exercising its police
52 and sovereign power declares that all phases of the premises are withdrawn from private controversy, and it provides a system of compensation in all cases of death or injury of employes in hazardous work. It declares that the construction of tunnels is a hazardous work within the meaning of the Act, and it provides a schedule of contribution by employers, and a schedule of compensation in case of death or injury, declares that the total loss of eyesight is a permanent, total disability within the meaning of the Act, and provides that the person so injured shall receive monthly, during the period of such disability, if unmarried, the sum of $20. It is contended that the provision for the payment of this insignificant sum in a case where a strong, healthy young man has been totally deprived of his eyesight, is so inadequate that it results in depriving him of his property without due process of law, and denies him the equal protection of the laws, and deprives him of his right under the Seventh Amendment to the Federal Constitution to a trial by jury. The proposition that by the compensation Law of Washington, the plaintiff is deprived of the right to a jury trial, contrary to the provisions of the Federal Constitution, cannot be sustained. Neither the Seventh Amendment nor the Fourteenth Amendment forbids the state to abolish or deny the right of trial by jury. Edwards v. Elliott, 21 Wall. 532; Walker v. Sauvinet, 92 U. S. 90. Said the court in the case last cited: "Due process of law is process due ac-

cording to the law of the land. This process in the states is regulated by the law of the state."

The constitutionality of the law of the State of Washing-
53 ton has been affirmed in State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156; State ex rel. Pratt v. Seattle, 73 Wash. 396; State v. Mountain Timber Co., 75 Wash. 581; and Peet v. Mills, 76 Wash. 437. We are not convinced that the Act is within the prohibition of any provision of the Federal Constitution. It was adopted by the state in the exercise of its police power, and with a view of correcting an evil by the substitution of a remedy for the existing remedy, which, the Act declared, "has been uncertain, slow and inadequate" for injuries which, "formerly occasional, have become frequent and inevitable." In Noble State Bank v. Haskell, 219 U. S. 104, 110, Mr. Justice Holmes said: "Many laws which it would be vain to ask the court to overthrow could be shown easily enough to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is different to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus mutare as against the law making power. * * * It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." The state legislature, in the exercise of its wisdom, has adopted for the case of an injury re-
54 sulting in total disability to an employe, a monthly compensation which is fixed and determined, and is secured to him for the remainder of his life. We are not prepared to say that it is not a better provision for him than the common law remedy, whereby he was required to prove the negligence of the defendant, and his cause of action was subject to the defenses of contributory negligence and assumption of risk, and the amount recoverable was uncertain, and was largely to be reduced by the payment of attorneys' fees.

We find no error. The judgment is affirmed.

[Endorsed:] Opinion. Filed May 29, 1916. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

55 Judgment, U. S. Circuit Court of Appeals.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2544.

WILLIAM RAYMOND, Plaintiff in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendant in Error.

In Error to the District Court of the United States for the Western District of Washington, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for its costs herein expended, and have execution therefor.

[Endorsed:] Judgment. Filed and Entered May 29, 1916. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

56 Petition for Writ of Error.

In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2544.

WILLIAM RAYMOND, Plaintiff in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RY. COMPANY, Defendant in Error.

The Plaintiff in error, William Raymond, feeling himself aggrieved by the opinion and judgment of the Court in the above entitled cause, affirming the judgment of dismissal on the pleadings by the District Court of the United States for the Western District of Washington, Northern Division, comes now by his attorney, and petitions this Honorable Court for an order allowing him to prosecute a Writ of Error to the Honorable Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided.

JOHN T. CASEY,
Attorney for Plaintiff in Error.

57 Copy Received June 26/16.

GEO. W. KORTE,
Attorney for Def't in Error.

[Endorsed:] Petition for Writ of Error to the United States Supreme Court. Filed Jul- 6, 1916. F. D. Monckton, Clerk.

58 *Assignment of Error.*

In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2544.

WILLIAM RAYMOND, Plaintiff in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RY. COMPANY, Defendant in Error.

Comes now the above named Plaintiff in error, William Raymond, and files the following Assignment of Error upon which he will rely in the prosecution of his Writ of Eror in the above entitled cause in the Supreme Court of the United States, for relief from the opinion and judgment rendered and entered in the above entitled Court and cause, affirming the dismissal of Plaintiff's action on the pleadings, in the District Court of the United States for the Western District of Washington, Northern Division.

1. The Honorable Circuit Court of Appeals erred in affirming the judgment of dismissal on the pleadings, rendered and entered in the said District Court of the United States for the Western District of Washington, Northern Division.

Wherefore, Plaintiff, Plaintiff in Error, prays that the said judgment of the United States Circuit Court of Appeals, Ninth Circuit, affirming the said judgment of the said District Court, and also that the judgment of the said District Court of the United States for the Western District of Washington, Northern Division, be reversed, and that directions be given that Plaintiff, Plaintiff in Error, may have a new trial on the merits of said cause, and that full force and efficiency may inure to the Plaintiff, Plaintiff in Error, by reason of his prosecution of his said causes of action herein.

59

JOHN T. CASEY,
Attorney for Plaintiff in Error.

Copy received June 26/1916.

GEO. W. KORTE,
Attorney for Def't in Error.

[Endorsed:] Assignment of Error. Filed Jul- 6, 1916. F. D. Monckton, Clerk.

60 *Order Allowing Writ of Error.*

In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2544.

WILLIAM RAYMOND, Plaintiff in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RY. COMPANY, Defendant in Error.

Upon motion of John T. Casey, attorney for William Raymond, the above named Plaintiff in Error, and upon filing a Petition for a Writ of Error and Assignment of Errors, as required by law, it is hereby:

Ordered, that a Writ of Error be, and is, hereby allowed to be reviewed in the Honorable Supreme Court of the United States, a judgment rendered and entered herein affirming the judgment of dismissal on the pleadings, entered in the District Court of the United States for the Western District of Washington, Northern Division, and that the transcript of the record be prepared and forwarded by the Clerk of this Court without the payment by the Plaintiff in Error of costs in advance and without the filing of a Cost Bond in his behalf; and that the Clerk of this Court sign, seal and issue said writ of error.

And it is further ordered that the exhibits, if any, and record be forwarded in the usual way to the Clerk of the Supreme Court of the United States at Washington, District of Columbia.

In witness whereof, the above order is granted and allowed this sixth day of July, 1916.

WM. B. GILBERT,
Senior U. S. Circuit Judge.

61–68 Copy Received June 26/1916.

GEO. W. KORTE,
Attorney for Def't in Error.

[Endorsed:] Order Allowing Writ of Error. Filed Jul- 6, 1916. F. D. Monckton, Clerk.

69 *Stipulation.*

636/25466.

In the Supreme Court of the United States, October Term, 1916.

No. 636.

WILLIAM RAYMOND, Plaintiff in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendant in Error.

It is hereby stipulated between the parties hereto, that in printing the record, the Clerk may omit the title from all papers except the first, and that only the following papers may be printed, and on which the case may be heard in the above Court.

1. Complaint. (Verifications need not be printed.)
2. Substituted Answer with Exhibit.
3. Substituted Reply.
4. Motion for Judgment on the Pleadings.
5. Order and Judgment of Dismissal.
6. Assignment of Error in District Court. (Transcript p. 25.)
7. Opinion and Judgment U. S. Circuit Court of Appeals. (Tr. 47-55.)
8. Petition for Writ of Error. (Tr. 56), Assignment of Error. (Tr. 58), and Order Allowing Writ of Error. (Tr. 60.)

It is further Stipulated, that this case may be consolidated with and heard at the same time as the case of Bay vs. Merrill & Ring L. Co., No. 165 of the October Term, 1916, if convenient to the Court. The same questions being involved.

THOMAS J. WALSH,
JOHN T. CASEY,
Attorneys for Plaintiff in Error.
HEMON H. FIELD,
GEO. W. KORTE,
Attorneys for Defendant in Error.

70 [Endorsed:] File No. 25446. Supreme Court U. S., October Term, 1916. Term No. 636. William Raymond, Pl'ff in Error, vs. Chicago, Milwaukee & St. Paul Railway Company. Stipulation as to parts of record to be printed, and that case be heard with No. 165. Filed August 28, 1916.

Endorsed on cover: File No. 25,466. U. S. Circuit Court Appeals, 9th Circuit. Term No. 636. William Raymond, plaintiff in error, vs. Chicago, Milwaukee & St. Paul Railway Company. Filed August 28th, 1916. File No. 25,466.

INDEX.

LIST OF CASES CITED.

In the Supreme Court of the United States

WILLIAM RAYMOND,
Plaintiff in Error,
—vs.—
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.
No.------

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error sued out by Plaintiff, from a judgment of the Circuit Court of Appeals, affirming the District Court, in granting Defendant judgment on the pleadings, in an action to recover damages for personal injuries.

PLEADINGS.

Plaintiff alleges a cause of action in negligence under the Employers' Liability Act of April 22, 1908. (Transcript 1.) Briefly stated, that while working in a tunnel on defendant's railroad in the

State of Washington, he struck a hidden charge of dynamite with a pick, and his eyes were blown out and entirely destroyed. Plaintiff also contends his complaint states a cause of action under the common law.

Defendant admits it owns and operates a common carrier railroad, and is engaged in interstate commerce, but denies that Plaintiff was employed therein, and that if he had any cause of action at common law, it was taken away by the State Compensation Act. (Tr. 4.) Plaintiff denies the affirmative allegations of the answer. (Tr. 9.)

THE FACTS.

The complaint alleges in part as follows:

"That on or about the 16th day of April. 1914, Defendant was engaged in straightening out its main railroad line and cutting down the grades thereon so as to better facilitate the movement of interstate and foreign commerce between said City of Seattle in the State of Washington. and said City of Chicago in the State of Illinois, and other cities and states, and at said time Plaintiff was employed by Defendant in said work of driving a tunnel to improve and better the roadbed between Horrock's Spur and Rockdale, on Defendant's main railroad line, and at said time and place and by said work, the Defendant was engaged, and Plaintiff was employed by said Defendant in work of improving, altering, repairing, straightening out, and bettering the roadbed, so as to facilitate and

make less difficult and expensive and more easy, secure, expeditious and efficient, the operation of freight and passenger trains on the Defendant's said railroad line in the carriage of both passengers and freight in interstate and foreign commerce and the work of Defendant, and Plaintiff's labor thereon, were acts and things incident to and made necessary for the constant, continuous and better operation of Defendant's said trains in the carrying on of its business of interstate commerce by railroad and in work incident to such commerce and as a necessary part thereof."

The following admissions are made in Defendant's answer:

"That it is a common carrier corporation, engaged in interstate and intrastate commerce with a line of railroad running from the City of Chicago in the State of Illinois to the City of Seattle in the State of Washington; that the said main line of railroad across the State of Washington was constructed in the year 1908, and its route crossed, and now crosses, the Cascade Mountains, through and over what is known as the Snoqualmie Pass, and is constructed on the summit of said mountains or pass without the aid of a tunnel and no tunnel of any consequence exists along the line of said railroad of said Defendant as it passes over the Cascade Mountains in King County, Washington, where the alleged accident to the said Plaintiff occurred; *that the said railroad over said mountains has been in operation as a through highway of interstate commerce since the year* 1908 *and is now in continuous operation as such;* that in the year 1913 this Defendant commenced the construction of a tunnel through the Cascade Mountains * * * *that when the same is completed it will be a part of Defendant's said main line of railroad between*

Seattle, Washington, and Chicago, Illinois, defendant will construct a railway track through the same and will operate trains thereover and will, by means of said trains carry freight and passengers from the State of Washington to other states and from other states through the State of Washington to the City of Seattle and other points bordering on Puget Sound."

QUESTIONS INVOLVED.

Questions involved in this writ of error are:

First: Are improvements and betterments to interstate railroads contemplated within the Federal Employers' Liability Act of 1908?

Second: Should the tunnel in question be classed as an improvement and betterment of Defendant's railroad, or as an independent undertaking?

Third: Was Plaintiff, while working in the tunnel, employed in interstate commerce, or in things necessarily connected therewith?

Fourth: What Act applies, Federal or State?

Fifth: Does the Washington State Compensation Act conflict with any provision of the Federal Constitution?

ASSIGNMENT OF ERRORS.

I.

The Honorable Circuit Court of Appeals erred in affirming the action of the District Court in granting Defendant's motion for judgment on the pleadings.

ARGUMENT AND AUTHORITIES.

First: Are improvements and betterments to interstate railroads contemplated within the Federal Employers' Liability Act of 1908?

In other words: Is the department engaged in making repairs and betterments in interstate railway service included with the other departments?

Improvements and betterments are necessary for the repair and upkeep of railroads. Without them no line could long continue in operation. Engines and cars are no more essential than roadbeds and tracks, in carrying on interstate commerce by railroad. All must be kept in repair, without which, the business could not continue. Are these things contemplated within the Employers' Liability Act?

Section 1 provides:

"Be it enacted by the Senate and House of

Representatives of the United States of America in Congress assembled, that every common carrier by railroad, while engaging in commerce between any of the several states and territories, or between the District of Columbia or any of the states or territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kindred dependent upon such employees, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, *track, roadbed,* works, boats, wharves, *or other equipment.*"

After this Court decided adversely the First Liability Cases, 207 U. S. 463, the demand for protection to railroad employees was so great the present law was passed almost immediately to meet the objections of that decision. It is reasonable to assume that Congress intended to include within it and protect, all classes that could be included, without again over-stepping the Constitutional limitation. This is expressly held in *Central Ry. v. Colasurdo,* 180 Fed. 632, affirmed in 192 Fed. 901, and cited with approval in *Pedersen v. Ry.,* 229 U. S. 146.

There was no thought of going half way only in protecting these men from injury without compensation.

Congress, after naming "cars, engines, applinaces, machinery, *track*, *roadbed*, works, boats, wharves," that nothing might escape, added the significant words: "OR OTHER EQUIPMENT." These words are unnecessary to this case, except to indicate the purpose of Congress to include every character of service connected with interstate railroads. Improvements to a railroad being just as essential as the operation of trains; Congress *could include* employees in both divisions. It had the same plenary power under the Constitution, over one as over the other, and in the sweeping langauge used, clearly indicated an intent, to include all and exclude none.

The lower courts are not in accord on what Congress intended by this epoch-making law, though it appears self evident, the idea was to raise all employees to a higher plane of employment where their lives and limbs would no longer be ruthlessly sacrificed in any endeavor or undertaking of interstate railroads. To quibble on words, in an effort to exclude some divisions of railway service, is clearly not in keeping with the broad and magnificent spirit of the Act.

In *Pedersen v. Ry., supra*, it is held the construction of a new or additional track comes under the Act. The facts of that case are stated in 197 Fed. 538, as follows:

"The Defendant is a common carrier of freight and passengers by rail and does an interstate and intrastate business. At the time of the Plaintiff's injury, it was engaged in building an additional track near Hoboken, N. J. Part of this track was to be laid upon a bridge, and the Plaintiff was hurt upon the *uncompleted* structure, while carrying material from one part of the work to another. The verdict establishes the fact that the negligence of a locomotive engineer was one cause of the injury, and that the Plaintiff, if negligent at all, was nevertheless entitled to receive a considerable sum. The *new track when finished* was *intended* for use both in local business and in commerce between states, but the train by which the injury was inflicted was a purely local train running between two points in the State of New Jersey. The suit is brought under the Employers' Liability Act of 1908, and the question is now to be decided whether that statute affords any relief for an injury under the foregoing facts."

Speaking of the Act in that case (229 U. S. 151-2), this Court said:

"That the Defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the Plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: *Was that work being done independently of the interstate commerce in which the defendant was engaged*, or was it so *closely connected*

therewith as to be a part of it? Was its performance a matter of *indifference* so far as that commerce was concerned, or was it in the nature *of a duty* resting upon the carrier? The answers are obvious. *Tracks and bridges* are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that *all of these instrumentalities be kept in repair.* The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct "any defect or insufficiency * * * in its cars, engines, appliances, machinery, *track, roadbed, works,* boats, wharves, or other equipment" used in interstate commerce. But *independently of the statute,* we are of the opinion that the work of keeping such instrumentalities in a proper state of repair while thus used *is so closely related to such commerce* as to be in practice and in legal contemplation *a part of it.* The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be *separated into its several elements,* and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? See *McCall v. California,* 136 U. S. 104; Second Employers' Liability Cases (*Mondou v. Ry.*), 223 U. S. 6;*Zikos v. Ry.*, 179 Fed. 863; *Central Ry. v. Colasurdo,* 192 Fed. 901; *Darr. v. Ry.*, 197 Fed. 665; *N. P. Ry. v. Maerkl,* 198 Fed. 1. Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of

maintaining them in proper condition after they have become such instrumentalities and during their use as such."

In a few cases there appears a fearful timidity to construe the law even fairly liberal. Every word of the Act, and of this Court in its construction, is bent backwardly, to find some justification for withholding its benefits from the unfortunate victims of railway negligence. In *Bravis v. Ry.*, 217 Fed. 234, the Court seizes an excerpt from this Pedersen quotation and extracts a meaning therefrom inconsistent with the decision. This comes from confusing an "instrumentality" of interstate commerce with its various parts or improvements. No improvement, whether large or small, becomes an instrumentality of commerce either before or after its construction; because not an entity to be used by itself; but rather for what it was intended; *a part*, or repair, of something already in use. In the Pedersen case the employee was carrying a sack of bolts to be used in a new track. Necessarily, neither bolts or track had ever yet been used as instrumentatlities of interstate commerce, nor could they, by themselves. The "instrumentality" of commerce was the interstate track, already there. It was *construction of the new or additional track;* a supplement, a better-

ment, of the old. (As in the instant case.) Like a new wheel or piston rod on an old car or engine. A new piece, or improvement, not a new utility. The Bravis case would first separate the *new* track, then the *new* girder, then the *new* bolts the man was carrying, and because these had not yet been used as instrumentalities of interstate commerce, would deny Pedersen the benefit of the Act, as the lower courts did in that case. The force of the Pedersen opinion as a whole is overlooked and the philosophy of the dissent is adopted, rather than the decision of the Court.

In the Bravis opinion, it is said:

"But there were no rails on the *roadbed* on this cut-off. It never had been used, it was not then used, and until it should be *ironed*, it could not be used, by the Defendant in interstate commerce."

Here the Court separates the work of the railroad into its elements or parts. It views the "cut-off" as an independent undertaking, not as an improvement. If the railroad was separated from the cut-off, the latter could not be used in interstate commerce after being ironed any more than before. It must be used with the balance of the road to be of any service whatever. The Court seems to have overlooked the words "any defect or

insufficiency" in the Act, as applied to the "roadbed." There was an expensive or "insufficient" place in the roadbed and track; hence the "cut-off" to better it. First there must be a railroad to be improved, then a new *part* to be *ironed*. Where a dangerous or insufficient place remains in a finished roadbed, it is just as essential to make it safe or complete, by tunnel or cut-off, as it is to iron the new part, or repair a defective engine or car. These changes and betterments are a part of the railroad business. The Court might as well have read out of the law, "tracks," "engines," "cars," etc., for all must be repaired and improved that the service may continue. Congress had the same purpose when it used the word "roadbed" as when it used the other words. Any change or betterment of the roadbed necessarily means a new part or place for the track. It was not intended to withhold the benefits of the law from men employed in making improvements on the roadbed any more than on the other instrumentalities, or the word would not be used with the others. We must conclude that men working on improvements to the "roadbed" are included in the Act, or that Congress employed a useless word. That it meant what it said when it used the word "engines," as in the Darr case, 197 Fed. 665, where new bolts and repairs

were put on an engine. That it also meant something when it used the word "cars," as in the Maerkl case, 198 Fed. 1, where it was repairing a car. Also when it used the word "tracks" as in the Pedersen case, 229 U. S. 146, where a new track was put in to supplement and better the interstate track; but that it had no purpose in using the word "roadbed." We doubt if this Court will draw such conclusion, or that it can be drawn in sound reason.

It is a matter of common knowledge, that every transcontinental railroad from the interior to the Pacific, after hurrying its first construction to the Western terminus, then improved and bettered the road by cutting down heavy grades, replacing sharp curves with slow ones, filling low places, and tunneling hills and mountains, replacing light steel with heavier rails and better equipment. After the road begins operations, these changes are necessary. Without them one road would cease to do business in competition with others maintaining them. The road itself would wear out were these improvements not made, yet each is not an *independent* undertaking, but a part of the railroad business.

Congress so clearly and positively indicated its purpose, by the terms of the Act, to extend rather than restrict, the application of the Law, that there is no warrant for a court to exclude men in the department of "repairs and betterments," of interstate railroads, and include only those in the "operating" department. The first is entitled to the benefit of the Act as much as the second since their work is necessary for the continuance of the other.

In *Eng. v. S. P. Ry.*, 210 Fed. 92, it was held the construction of a *new office*, was in *the nature of a repair* of the freight shed it was attached to. In *Col. Ry. v. Sauter*, 223 Fed. 604, it was held the preparation of a place to construct a new bridge *was not independent of* the interstate commerce in which the railway was engaged, and was contemplated within the Liability Act. It is hard to distinguish any difference in principle between these cases and the one at bar. See also *Lamphere v. Ry.*, 196 Fed. 336; *Oliver v. N. P. Ry.*, 196 Fed. 432; *San Pedro Ry. v. Davide*, 210 Fed. 870; *Thomas v. Ry.*, 219 Fed. 180, where the District Court in 218 Fed. 143, was reversed; *Johnson v. Ry.*, 178 Fed. 643; *Zikos v. Ry.*, 179 Fed. 893; *Stafford v. Ry.*, 202 Fed. 605.

The first question asked in the beginning of the brief: "Are improvements and betterments to an interstate railroad contemplated within the Employers' Liability Act of 1908?" should be answered in the affirmative. To answer it in the negative is to say it is not necessary to make dangerous places in the roadbed safe. The Act declares this is the carrier's duty. If the word "roadbed" is retained in the law, the conclusion is inevitable that improvements to it are contemplated by the Act the same as improvements to the other instrumentalities. Employes working in the department making repairs and betterments are as much entitled to protection as those employed in other departments. Congress included, not one, but all.

TUNNEL IS IMPROVEMENT.

Second: Should the tunnel in question be classed as an improvement and betterment of defendant's railroad, or as an independent undertaking?

This is a question of fact for a jury to determine, though the answer is self evident. If Defendant had no interstate railroad the tunnel would not be built to improve it. So it is not an independent undertaking. The answer admits as much.

We believe the Appeals Court in the case at bar reached the conclusion it did reluctantly, after a year of deliberation. It hesitated to disagree with the Court in the Bravis case on similar facts. The Act, however, holds the carrier responsible for "any defect or insufficiency" in the "track, roadbed," etc. Here was a defect and insufficiency in defendant's track and roadbed to be corrected. The tunnel was for that purpose. The case is covered in the Second Employers' Liability Cases, 223 U. S. 1, where this Court said:

"As is well said in the brief prepared by the late Solicitor General: 'Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The Act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less economi-

cal, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

The complaint in the instant case alleges the necessity of improvement to Defendant's roadbed at this dangerous place. Exhibit "A", attached to Defendant's answer shows with unerring certainty the truth of this allegation. A report made by Defendants superintendent in September, 1914, while not a part of the pleadings as such, clothes the Exhibit in words, which we adopt to show the urgent necessity of the tunnel or other means of improvement, in continuing interstate commerce safely over this bad place. He said:

"But with the line *completed and handling* traffic, the NECESSITY FOR A TUNNEL WAS APPARENT; after the strenuous winter of 1912-13, when the road over the mountains was many times buried under gigantic snow drifts and slides often reaching a depth of forty feet and over, and to avoid the yearly repetition of serious snow troubles, and their consequent *delays to traffic*, not to mention the *loss and cost incident thereto*, work on the tunnel was started in earnest. * * * This tunnel will effect a saving of a distance of about three and one-half miles, in elevation of 443.5 feet, and in curvature of 1,239 degrees or over three circles.

It is a single track bore with an ascending east bound grade of four-tenths of one per cent. to a point about 2,000 feet west of the east end, and an ascending grade from the east end to the summit of the tunnel of one-tenth of one per cent. In operating trains over the mountains these remarkably low gradients will be *a very great saving in power and other expense*, compared with the present route and the grades over the Pass."

Defendant seeks to avoid the force of these facts by pleading that their railroad now crosses the mountains "without the aid of a tunnel, and no tunnel *of any consequence* exists along the line of said railroad." Defendant tries to distinguish between a tunnel 14,000 feet long and one *of less consequence* 1,400 feet long or 14 feet long, and the Appeals Court bases its decision on such a distinction. How or at what length is the line going to be drawn for future guidance? It is impossible to class this tunnel as anything but an improvement to Defendant's railroad. It is not a tunnel from one state to another. It is not, and can never become, an instrumentality of interstate commerce by itself. It can be used only to better the instrumentality—the railroad, as intended when built. To separate it from the railroad at each end would make it a useless hole in the mountain, for it is not a mine or other thing of value, except to improve the roadbed, where a rise and fall of 443 feet and

a curvature of three circles is made in a few miles. The expense and dangers of operating trains in these circumstances is obvious. Their elimination necessary. The perils of trainmen on the steep grades and sharp curves are materially lessened by their brother employees working under the mountains to improve the track and roadbed. These improvements and changes are necessary to the business as a whole, and just as necessarily, contemplated by the Liability Act. If each improvement is classed as an independent undertaking, the employees in one department receive the benefit of the law, while others, whose work is more dangerous and equally as necessary, are denied such benefits. Employees in the operating department alone receive the protection of the law, while those in the department of repairs and betterments are read out of it. If Congress had such intent, it failed to express it but clearly voiced a different purpose.

Counsel may argue the tunnel is not an improvement, yet must admit it is. No improvement can be used until completed, and then not alone, but with the balance of the road. The contrary argument leads to an absurdity. It would give the benefit of the law to an employee taking out an old tie or rail from the interstate track and deny it

to the employee putting in the new tie or rail to replace it, because the latter had not yet been used as an instrumentality of interstate commerce. The whole effort is to make *this tunnel appear large enough* to be excluded from the Act, while if smaller it would not. The size can make no difference. The test should be: will the tunnel when finished, be used alone *or as a part of the railroad*, to make it more efficient? The Liability Act makes it Defendant's duty to eliminate bad places. Whether by tunnel or otherwise is immaterial. The reasoning that considers the improvement as *an entity, or whole instrumentality*, during construction, and *only a part* when completed, is unfair and fallacious. It should not be considered for one purpose before, and for a different purpose after completion. Defendant may be improving fifty bad places on its whole line, by tunnels and otherwise. Wherever found, it has that duty to perform. None is an *independent* undertaking, but a part of the business as a whole. The transportation of freight, is not the only work of interstate commerce by railroad. The upkeep and betterment of the roads and cars is also essential. As Congress made no distinction of work, or exception in the law, neither should the Courts.

If the allegations of the complaint, or statements of the superintendent are true, this change in Defendant's roadbed and track was necessary, and Defendant's duty under the law to make it; the method of betterment being wholly unimportant. But independently of the statute, as the Pederson opinion says:

"The work of keeping the instrumentalities (the railroad) in a proper state of repair is so closely related to interstate commerce as to be in practice, and in legal contemplation a part of it. * * * The contrary contention proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relations to others or to the business as a whole. *But this is an erroneous assumption.*"

So it is an erroneous assumption here to assume that driving the tunnel to correct this dangerous place, is different from other improvements, or that it can be separated from the "*business as a whole,*" which requires all changes and repairs necessary to continue the service with safety.

This conclusion is not in conflict with the Behrens case, 233 U. S. 477, where the employee at the time of accident was engaged in *intrastate* commerce. If Defendant was driving two tunnels, one in inter, the other in intrastate commerce, and if Plaintiff was taken temporarily from the inter-

state tunnel to the other, and there injured, his case would be governed by the Behrens decision. But Defendant admitting the tunnel was to improve its interstate railroad, the case comes under the Mondou and Pedersen decisions, *supra*.

The whole thing comes back to whether Congress meant to give the benefit of this law to railroad employees in *all*, or in *limited*, departments. Judging from the language used, it was meant to include at least all departments of dangerous service. There is nothing to indicate a limited application, or to omit or exclude employees making necessary improvements to the "roadbed" or the word would not be used. The Court should not exclude these men for Congress had the same constitutional power to legislate for their benefit as for the others.

Defendant's answer says of the tunnel:

"That when the same is completed *it will be part of defendant's said main line of railroad* between Seattle, Washington, and Chicago, Illinois."

Why deny in argument, what is here admitted in the answer?

The question, should Defendant's tunnel be classed as an improvement and betterment of its railroad, must necessarily be answered in the affirmative. Any jury would so answer it. If the

allegation of the complaint quoted is true, and its truth must be assumed, for the Court had no right to grant judgment on the pleadings without assuming it was true; Plaintiff had a right to introduce his proof of Defendant's negligence in causing his injuries and have a jury determine his damages.

PLAINTIFF'S EMPLOYMENT.

Third: Was Plaintiff employed in interstate commerce or in work connected therewith?

An affirmative answer to the first two questions requires an affirmative answer to this. If the department of "Repairs and Betterments" to an interstate railroad are included in the Liability Act; Defendant's tunnel being an improvement; then Plaintiff was employed in interstate commerce within the meaning of the Act. This railroad, two thousand miles long, has a dangerous place for three miles; expensive in operation, where employees and public alike are constantly imperiling their lives in crossing it. An improvement, a change, is imperative. The tunnel is the method used to improve the road. Its size cannot class it by itself, or different from improvements of less moment. Plaintiff's work has a real and substantial relation to interstate commerce. It makes it less "slow and

costly," and more "expeditious, economical and efficient," at this place. Congress may legislate, and has legislated, about the "roadbed." Plaintiff contributes his labor to better this dangerous place in the roadbed. The Act protects men so employed the same as on "engines" and "cars." Unless *the use* of the tunnel is independent of the railroad, its construction *is not an independent undertaking.* Plaintiff was employed in a department of the interstate business, in which Defendant was engaged. The work is just as essential and there is more danger in blasting a tunnel to improve the interstate roadbed and track, than a yard clerk taking numbers of cars. See *St. L. Ry. v. Seale*, 229 U. S. 156. Improving and repairing an interstate roadbed, is interstate commerce as much as repairing a car, as in *N. P. Ry. v. Markl*, 198 Fed. 1, *supra.*

The object of Plaintiff's work was to improve and strengthen the road, that interstate passengers and freight might be carried more safely and economically. This is connected with Defendant's interstate commerce, as alleged in the complaint. Unless unequivocally admitted, the evidence should be produced and the jury's verdict taken on this, and the second question. Every presumption of fact should be made in Plaintiff's favor where his rights have been summarily cut off by judgment on the

pleadings. The third question should be answered in the affirmative, or it should be answered by a jury.

FEDERAL ACT APPLIES.

The argument already made answers the fourth question. The purpose of Congress to protect railroad employees in all departments or divisions of interstate service being plain; and improvements and betterments to a railroad being contemplated within the Liability Act; as a matter of course, Defendant's tunnel comes within the provisions of that Act. If so, the Federal, not the State, Act applies. "That which is not supreme must yield to that which is." *Brown v. Md.*, 12 Wheat. 419-48.

In *St. Louis Ry. v. Hesterly*, 228 U. S. 702; 57 L. Ed. 1031, it is held:

"The Liability of an interstate railway carrier for personal injuries resulting in the death of a servant while employed in interstate commerce is measured by the Federal Employers' Liability Act of April 22, 1908, which supersedes all applicable state laws."

See also *Mo. Ry. v. Wulf*, 226 U. S. 570.

The case comes under the Federal Act, and the State Act cannot abridge Plaintiff's rights thereunder. It is immaterial whether or not Defendant

has complied with the State Compensation Act. Plaintiff has received or accepted no benefits thereunder, and it is elementary, he cannot be precluded by any State Act from his rights under the Act of Congress.

IS STATE ACT CONSTITUTIONAL?

Fifth: "Does the Washington State Compensation Act conflict with any provision of the Federal Constitution?"

While we are confident of our position on the other questions, we feel it advisable to briefly present this. No doubt this Court is reluctant to declare a State Law unconstitutional. The Washington Act, however, is not like that of Montana and some other states, which make benefits thereunder a matter of contract, and allows an injured workman an option of whether or not he shall sue, or accept the benefits. The Washington Act takes away the Employee's cause of action absolutely.

In the case at bar Plaintiff is a citizen of the United States residing in the State of Washington. The Defendant is a Wisconsin corporation. The controversy is between citizens of different states in a Federal Court. The right of jury trial should prevail. Article VII. of the Constitutional Amendments, provides:

"In suits at common law, where the value in controversy shall exceed $20.00 the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

Article XIV, among other things, provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Plaintiff's cause of action is a property right, and involves more than $20.00. The state law that takes it from him arbitrarily without a jury trial, is not Due Process of Law.

It is no answer to say the Act treats all in a certain class alike. It takes away the right of jury trial from a citizen of the United States, granted by the Federal Constitution in the Federal Courts. If the State can abrogate this Constitutional right from injured employees in Federal Courts, it can take from every other class the same and every guaranteed right. A doctor or merchant may now demand a jury to settle his controversy; an injured laborer cannot. This is not "Equal Protection of the Law." This conclusion is not theoretical. Plaintiff in this case was earning $5.00

per day—150.00 per month. If he accepts Compensation under the State Law he is allowed a maximum of $20.00 per month. No State Legislature has the right to force this provision upon a citizen of the United States. Where the State Law is absolute in its terms and gives a citizen no right of choice or of contract, it is unconstitutional.

The Justices v. United States, 9 Wall, 274: 19 L. Ed., 658.

"The right of trial by jury in the courts of the United tSates is expressly secured by the Seventh Amendment to the Constitution."

Baylis v. Co., 113 U. S. 316-21; 28 L. Ed. 990.

See also:

Am. Pub. Co. v. Fisher, 166 U. S. 464; 41 L. Ed. 1079.

The part of defendant's answer alleging compliance with the State Compensation Act, is no defense to plaintiff's cause of action in a Federal Court, where he is entitled to have a jury pass upon the amount of his compensation.

Should this Court conclude that Plaintiff's case comes under the Federal Act, the lower courts should be reversed on that ground. It is most

desirable, however, to also settle the constitutionality of the State Act, in the Federal Courts.

The judgment of the District and Circuit Court of Appeals should be reversed and plaintiff allowed to prove his case.

Respectfully submitted,

JOHN T. CASEY,

Attorney for Plaintiff in Error.

THOMAS J. WALSH,

Of Counsel.

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TABLE OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

WILLIAM RAYMOND,
Plaintiff in Error,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

No. 636.

ON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

Brief of Defendant in Error

STATEMENT.

Plaintiff in error filed a complaint (Rec., p. 1), in the District Court, charging that he was an employe of the defendant in error, and, at the time of his injury, was engaged as a common laborer with a pick and shovel in the work of driving a tunnel, which tunnel when completed would be about fourteen thousand feet long; the purpose of the tunnel being to shorten the railway line which at that time ran over the mountain through which the tunnel was located (Blue Print, Rec., p. 8.)

It was further alleged in the complaint that the work of driving the tunnel was for the specific purpose of improving and bettering the roadbed by cutting down the grade so as to facilitate and make less difficult and inexpensive and more efficient the operation of freight and passenger trains in the carriage of interstate commerce.

The defendant in error answered and denied the facts set out in the complaint as not being the true facts of the plaintiff's real employment, except as to "the work of driving a tunnel." In its answer, the defendant in error set forth in full and in detail the particular work which the plaintiff in error was performing at the time he was injured, which facts showed that the work was solely the construction of a tunnel through the Cascade Mountains, wholly unfinished, and located off the main line of the railroad, and entirely disconnected therefrom and in no manner interfering with the operation of interstate commerce over the main line of the railroad; that the construction work of said tunnel could not physically interfere with any movement of the interstate commerce carried on by the defendant in error on its main line for the reason that the location and the boring of the tunnel was away from any point of connection with the main line, and on account of being in the process of construction trains could not pass through the incomplete hole then being bored through the mountain (Rec., p. 4); and it attached to its answer a blue print showing the actual location of the tunnel then in the course of construction. (Rec., p. 8.)

By way of special plea to the jurisdiction of the Court (Rec., pp. 6, 7) defendant in error pleaded in its answer that the particular work being done by the defendant in error at the time of the alleged accident to plaintiff in error was such as was embraced within the Washington State Compensation Act then in force (Chap. 74, Law of 1911), and that plaintiff in error at such time was an employe embraced within the provisions of said Act; that the defendant in error at the time was complying with said Act, and under the provisions of said Act had been assessed and was paying to the State of Washington all premiums or sums due or levied against it for all claims made for personal injuries to persons engaged in the work of the class to which plaintiff in error belonged, namely, tunnel work.

It was further alleged that because the plaintiff in error was embraced within the said Act, and the defendant in error on account of the particular tunnel work being carried on was likewise within said Act, the sole remedy of the plaintiff in error for his alleged injury was through the provisions of said Compensation Act; and on account thereof, defendant in error insisted that the present action could not be maintained under the Federal Employers' Liability Act.

In reply to the facts set forth in the answer, plaintiff in error, by specific plea (Rec., pp. 9, 10) admitted the ultimate facts, admitted the location of the tunnel as shown on he blueprint attached to the answer of the defendant in error, and by way of

a legal conclusion denied the effect of the ultimate fact so admitted.

In reply to the plea of the defendant in error to the jurisdiction of the court, the plaintiff in error likewise admitted the facts therein set forth. (Rec. pp. 9, 10.)

The defendant in error then moved for judgment on the pleadings, (Original Record, p. 20), because on the face thereof, it was undisputed that the work in which plaintiff in error was at the time engaged was not interstate commerce; and, further, that his only source of compensation was through the Washington State Compensation Act (Chapter 74, Laws of 1911), then in force, relating to the compensation of injured workmen engaged in tunnel work, and with which the defendant in error was at the time complying.

That motion was sustained, and judgment was entered for the defendant in error, dismissing the action out of court. (Rec. p. 11.)

ARGUMENT.

It being admitted by the pleadings that the defendant in error was at the time complying with the Washington State Compensation Act, and that the particular tunnel work was such as is embraced within that Act, it follows that whatever *common law right* plaintiff in error may have had to recover against defendant in error for his alleged injuries had been taken away from him by said Act. Therefore, unless plaintiff in error

can sustain his claim that he was embraced within the Congressional Act, and is not an employe over whom the State of Washington has jurisdiction, he has no direct cause of action against the defendant in error. His sole relief is through the remedy provided by the Washington State Compensation Act.

So reduced, the sole question involved at bar is, whether a laborer engaged in boring a tunnel for the construction of a railroad through it, which tunnel and railroad when completed will be used in interstate commerce, is by reason of such construction work engaged in interstate commerce so as to bring him within the protection of the Federal Employers' Liability Act.

We are convinced that this Court has made it plain in the Second Employers' Liability cases (223 U. S. 1), in Pedersen's Case (229 U. S. 146), in Behren's Case (233 U. S., 473) and in Harrington's Case (241 U. S. 177) that a line of demarcation must be drawn between Federal and State employes working for interstate railroads, and that not every employe hired by an interstate railroad is performing a service in interstate commerce. In the cases mentioned the line is distinctly drawn between the work of constructing instrumentalities to be used in interstate commerce, and the repair and upkeep of those instrumentalities after they have been put to actual use by the interstate railroad for moving Interstate Commerce. Unless such division line is drawn, the Act would embrace "all the activities in any way connected with trade between the states, and ex-

clude state control over matters purely domestic in their nature," (*Hooper v. California*, 155 U. S. 648, 655), and the Act would fall for the reasons asserted in the First Employers' Liability Cases (207 U. S. 463). It would include not only those who are employed in interstate commerce, but also those engaged in other departments of business. For instance, if it included workmen engaged in the construction of those things which would thereafter be used to move interstate commerce, it would cover employes laboring upon the construction of engines designed as better engines than those in use; and it would include the employe whose inventive genius discovered the improvement, as well as the men who built the parts to fit the ideas of the inventor; the men who tested out the engines to see whether they performed the work for which they were intended—all of which would precede the actual turning over of the engines to the railroad desiring them as improvements over the inferior ones then used to move interstate commerce.

It would similarly include those connected with the construction of better box cars, more commodious sleepers, more fascinating dining cars, all of which are intended to improve the service and facilitate the movement of interstate commerce.

It is inconceivable how one can contend that any of the instances just enumerated are in any manner connected with the movement of the interstate commerce. Likewise, we are unable to perceive how the work of boring a tunnel is any dif-

ferent than the work of constructing a new engine, a new box car, or any other new vehicle, which may be manufactured by some independent corporation and sold to an interstate railroad company.

Counsel's ingenious claim (Brief, 5) is bewildering. He confuses the use to be made of that which is being constructed with the work of construction. He makes that part of interstate commerce which has not as yet become such. He insists that an instrument, not yet put in use and never used, is a part of the work. Such claim is preposterous, and cannot be of any value in determining when a given service is a service in interstate commerce.

In the Pedersen case (229 U. S. 152), it is pointed out that

"The true test always is:—Is the work in question a part of interstate commerce in which the carrier is engaged? * * * Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

The path to be followed is unmistakably stated in the foregoing case. Ever since the Pederson case, this Court, as well as the various District Courts and State Courts dealing with the Federal Act have understood that employes engaged in the construction of instrumentalities not then in use

are not performing services in interstate commerce.

The opinion of the Circuit Court of Appeals in the case at bar needs no help on our part to sustain it. We cannot, by reviewing the extravagant notions of counsel in his brief make the opinion any plainer or more conclusive.

Like work was involved in the case of *Bravis vs. C. M. & St. P. Railway Company*, 217 Fed. Rep. 234, and the Eighth Circuit Court of Appeals held such work was not a part of interstate commerce.

In *U. S. vs. C. M. & P.S. Railway Co.*, 219 Fed. Rep. 632, it was held that train employes connected with work trains hauling dirt to fill a bridge (not repairing it) on defendant's interstate line were not, while doing such work, performing a service in interstate commerce.

In *Alexander vs. Railroad Co.*, 154 Pac. 914, the Supreme Court of Montana held that the work of hauling new ties to a creosoting plant for the purpose of treatment, being a movement wholly within the State,, was not interstate commerce.

In *Steele vs. Railroad Co.*, 108 N. E. 4, the Supreme Court of Illinois held that the construction of a second or double track was not work connected with interstate commerce.

In *Killes vs. Railway Co.*, the Supreme Court of the State of Washington, in an opinion handed down on November 22, 1916, (160 Pac. —) has held that a workman engaged in constructing a

staging to be used in connection with the painting of a freight shed then in use, was not, while building the staging, engaged in work connected with interstate commerce. The opinion is rested upon *Shanks vs. Railway Co.*, 239 U. S. 556, *Delaware, etc., Railway Co. vs. Yurkonis*, 238 U. S. 439, and *Ill. Cent. Railway Co. vs. Rogers*, 221 Fed. R. 52.

The fact that the tunnel was expected on its completion to be used in interstate commerce is not enough to make it an instrument of interstate commerce so as to bring plaintiff in error within the Federal Act, (*Ill. Cent. Ry. Co. vs. Behrens*, 233 U. S. 473, 478.)

We are unable to distinguish between the construction of a tunnel and the construction of any other instrument which might after its completion be used in interstate commerce. If we are correct, the plaintiff in error was not at the time he received his injury performing a service in interstate commerce, and therefore has no right to recover under the Federal Employers' Liability Act. Not having such right, his sole remedy is, as pleaded in the answer of defendant in error, the compensation allowed to him under the provisions of the Washington State Compensation Act.

To get from under the State Compensation Act of the State of Washington, plaintiff in error attacks the Act as being unconstitutional. The opinion of the Circuit Court of Appeals, in this case (Rec. p. 13) answers all and more than counsel has said about the Act. The Act has been held constitutional by the Supreme Court of the State

of Washington in *State ex rel. Davis-Smith Co. vs. Clausen*, 65 Wash. 156; *State ex rel. Pratt vs Seattle*, 73 Wash. 396; *State vs. Mountain Timber Company*, 75 Wash. 581, and *Peet vs. Mills*, 76 Wash. 437; and involved in the case of *Nor. Pac. Ry. Co. vs. Mees*, 239 U. S. 614.

The claim made that by the Washington State Compensation Act plaintiff in error has been deprived of his right of trial by jury, has been finally disposed of as not sound in the cases of *Bombolus vs, Ry. Co.* 241 U. S. 211, *Cent. Vt. Ry. Co. vs. White*, 238 U. S. 507; and *Norfolk So. Ry. Co. vs. Ferebee* 238 U. S. 269.

Counsel for plaintiff in error, in his brief on page 17, sets forth a purported report made by one of defendant's superintendents. Such report is not in either the pleadings or the record before the Court. While it is immaterial and without any bearing upon the question before the court, the claim for it without proof is remarkable.

It is submitted that there has been no reason given by plaintiff in error why the judgment of the District Court should not be affirmed.

Respectfully submitted,

HEMAN H. FIELD,
GEORGE W. KORTE,
Attorneys for Defendant in Error.

In the Supreme Court of the United States

WILLIAM RAYMOND,
Plaintiff in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

No. 636.
October Term, 1916

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

REPLY BRIEF OF PLAINTIFF IN ERROR

QUESTIONS INVOLVED.

Defendant in error evades rather than answers the questions involved in this writ of error. The first three (Opening Brief 4) are:

1. Are improvements and betterments to interstate railroads contemplated within the Federal Employers' Liability Act of 1908?

2. Should the tunnel in question be classed as an improvement and betterment of defendant's railroad, or as an independent undertaking?

3. Was plaintiff, while working in the tunnel, employed in interstate commerce, or in things necessarily connected therewith?

FACTS CORRECTED.

Defendant in error says of the tunnel (Brief 2), it is:

"Located off the main line of the railroad, and entirely disconnected therefrom."

Exhibit A attached to the answer (Tr. 8) shows the tunnel was at all times physically connected with the railroad at both ends, and never was *an independent undertaking.* The answer admits the tunnel: "when completed will be PART *of defendant's said main line of railroad.*"

DEFENDANT'S ARGUMENT.

Defendant in error (Brief 5), after citing, *Second Employers' Liability* cases, 223 U. S. 1; *Pedersen's case,* 229 U. S. 146; *Behren's* case, 233 U. S. 473, and *Harrington's* case, 241 U. S. 177, says:

"In the cases mentioned, the line is distinctly drawn between the work of constructing *instrumen-*

talities to be used in interstate commerce and the *repair and upkeep* of those instrumentalities after they have been put in actual use."

Here "repair and upkeep," by inference, is admitted to be within the act, and answers the *first* question in the affirmative.

Next, is the tunnel included in "repair and upkeep" of the road? The railroad is (the tunnel is not) an "instrumentality" of commerce. The tunnel is the improvement,—the upkeep.

Defendant (Brief 5) adroitly evades the second question, and says:

"The sole question involved is whether a laborer engaged in boring a tunnel for the *construction of a railroad* through it, which tunnel and *railroad,* when completed, will be used in interstate commerce, is by reason of such construction work engaged in interstate commerce so as to bring him within the protection of the Federal Employers' Liability Act.

The boring of the tunnel was not for: "the construction of a railroad." Defendant already had a railroad. It was not constructing another one. It was improving a dangerous place on its "roadbed." We are not attempting to erase the line of demarkation between "construction" and "repair," of the *instrumentalities* of commerce, but to class *this* improvement the same as *others.* If there is a

difference between *"repairs, improvements and upkeep"* of *instrumentalities* and the *"instrumentalities"* themselves, it applies to all alike. Congress had the same purpose in mentioning "cars" "engines," "tracks," "roadbeds." All are used in the same sentence. The car can't move with its load of freight except pulled by the engine over the roadbed and track. Therefore "roadbed" and track are just as closely connected with interstate commerce by railroad as engines and "cars." The improvement of one is as much interstate commerce as the repair of the other. The betterment of a dangerous place in a roadbed, *the chief instrumentality of commerce,* is not remote from, but closely connected with, interstate commerce by rail. Did Congress employ "roadbed" in the act uselessly, while it had a purpose in using the other words in the same sentence? If a door was lost off a car and the car was sent to the shop to have a new one put on, such repair of the car comes within the act. It would be just as sensible to personify the new *door* as an *instrumentality* of interstate commerce, as to personify the *tunnel* as such. Each is only a repair or betterment. Counsel could become just as eloquent and stray just as far from the true rule in arguing about the new door on the car as

an instrumentality of commerce as about the new tunnel on the roadbed.

The case here is simple. Defendant had an interstate "roadbed" from Chicago to Seattle. It was using it in interstate commerce. There was a dangerous place for three miles, and defendant sent Raymond and others out to fix the place, and avoid accidents and excessive operating expenses. Defendant (not plaintiff) in error selected the method of eliminating the danger and expense. All the time Raymond was in the tunnel he was working on part of the "roadbed" to make it more "usable."

We are not asserting any of the fantastic examples given on page 6 of defendant's brief. No improvement of a dangerous place in a roadbed can be made without changing the location more or less, and making a new place for the track. That is the only way it can be improved. If the making of the *new place* does not come under the act, then "roadbed" and "track" are both useless words in the act. It is the carrier's duty to repair and better all such dangerous places whether large or small.

To hold that construction of the *improvement* on the "roadbed" does not come within the meaning of the Act is to expunge that word from the law.

Counsel says (Brief 4) it was admitted: "The particular tunnel work was such as is embraced within the State act." There is no such admission. A necessary improvement on an interstate railroad, whether made by tunnel or otherwise, is within the Federal act. Other things than transportation are necessary to interstate commerce by railroad.

Brief, p. 7, says: "We confuse *the use* of a thing with its *construction.*" We hope not to confuse anything, but might suggest that sometimes an *improvement* is mixed with the *thing improved.* Counsel says he cannot see how boring a tunnel is any different from constructing a new engine or box car. The difference is obvious. The tunnel is only *a part* of the roadbed. The engine or car is a whole vehicle. The tunnel was a large improvement, but only large enough to fit the bad place on the roadbed.

Counsel says: "We make that part of interstate commerce which has not yet become such." Not if improvements and repairs come within the act. Of course, they cannot be used until put on the instrumentalities.

Further (Brief 9):

"We are unable to distinguish between the

construction of a tunnel and the construction of any other instrument which might, after its completion, be used in interstate commerce."

Here, again, the *improvement* is confused with the instrumentality.

AUTHORITIES.

Counsel does not attempt to review any of the authorities cited on page 14 of our opening brief.

On page 7 of defendant's brief an excerpt from the *Pederson* opinion was again given a meaning inconsistent with the decision of the court, as in the *Bravis* and *Steele* cases.

When the court said: "We are not here concerned with the constructions of tracks, bridges, engines or cars." That very thing was meant. The concern was not with the construction of a new engine, or car, or *interstate* track. It was not meant to exclude the improvements or repairs to any of these things. The question was:

"Was that work being done *independently* of the interstate commerce, in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?

Nowhere, in either answer or brief, does defendant in error assert that this tunnel was an

independent undertaking. If not, it was so *closely connected* with its business (repair of its roadbed) as to be a part of it.

"Sound economic reasons unite with settled rules of law in demanding that *all* of these instrumentalities be kept in repair."

The tunnel repairs and betters defendant's "roadbed."

Alexander v. Ry., 154 Pac. 914, holds that hauling ties to a creosoting plant, while it might be *remotely* connected with interstate commerce, was not a part of it. Improving a roadbed is its *upkeep*. No improvement is made for itself, but for the railroad.

United States v. Ry., 219 Fed. 632, is a criminal case, where strict construction obtains. It is not in accord with *Eng. v. Ry.*, 210 Fed. 92; *Col. Ry. v. Sauter*, 223 Fed. 604, and *San Pedro Ry. v. Davide*, 210 Fed. 870, on the Liability Law. The court was of the opinion that only hauling interstate trains was included within the criminal law. The 59 days spent in bettering the roadbed were excluded.

The *Killes* case, 160 Pac. ....., is not similar to the instant case on the facts, and seems extreme.

Steele v. Ry., 108 N. E. 4, opens a question that has not yet been before this court. We doubt if the

construction of a new interstate railroad was contemplated by Congress in the enactment of the Liability Law. But where it has once started operations and traffic becomes so great that double tracking is necessary, we believe such improvement is contemplated in the broad language of the Act. A second track is not another railroad, but an improvement. If it became necessary to put a double floor in an old car to be used for heavier work, the repair of that car would no doubt come within the Act. The betterment of the car is no more closely related to interstate commerce than the betterment of the railroad. We do not meet that question in the instant case, however, which remains for future adjudication. It was there said:

"The proposed new track had never been used for any kind of traffic, and *might never be used in any kind of commerce.*"

The same in the *Bravis* case: "That the cut-off might never be used in interstate commerce."

In that aspect these cases differ from the instant case, where defendant admits, both in answer and brief, that the tunnel, when completed, was to be used as a part of the road in interstate commerce.

In the *Shanks* case, 239 U. S. 556, cited by defendant, it is said: "Repairing or keeping in usable condition a roadbed," etc., is within the Act. That is exactly what Raymond was doing in the instant case.

IS STATE ACT SUPREME?

In brief (p. 3) the claim is made that because defendant in error complied with the State Compensation Act that therefore Raymond *ipso facto* was embraced therein. That he had no rights under the Federal act. This argument assumes the State act is supreme and supersedes the Federal law. The contrary is true. *Brown v. Md.*, 12 Wheat. 419-48; *St. Youis Ry. v. Hesterly*, 228 U. S. 702; *Mo. Ry. v. Wulf*, 226 U. S. 570, cited in our opening brief.

CAN STATE COMPENSATION ACT ABOLISH THE CITIZEN'S RIGHT IN FEDERAL COURTS?

Counsel (Brief 10) cited *Bombolus v. Ry.*, 241 U. S. 211, and other cases which hold the states may *regulate* jury trials by providing less than unanimous verdicts, etc., where the right is not abolished. The Washington law does not *regulate*, but *destroys*, the right. We doubt if the State

Legislature can do this, even in state courts. But where does it get the supreme power to reach into the Federal courts and abolish the right of jury trial there? See: *American Pub. Co. v. Fisher,* 166 U. S. 464, 41 L. Ed. 1079; *Springville v. Thomas,* 166 U. S. 707, 41 L. Ed. 1172; *Capital Traction Co. v. Hof,* 174 U. S. 1, 43 L. Ed. 873.

CONCLUSION.

There is no way to escape including this tunnel improvement to the roadbed, the same as other improvements. It is not in a class by itself or an independent undertaking. Suppose men refused to work on such improvements to the roadbed and track unless protected by the Liability Act. Business on the road would stop because these necessary improvements and repairs could not be made. Transportation is only a small part of interstate commerce, and "commerce" is the word used in the Act. All the other activities of the railroad necessary to continue transportation safely are included. Let us illustrate again:

Concede, for the sake of argument, the construction of a *new* "engine" is not within the meaning of the Liability Act; *the repair* of an *old engine* is, even if the repair consists in putting on a new wheel where the engine needs a wheel.

Concede, for the sake of argument, the construction of a new "roadbed" is not within the meaning of the Liability Act; the repair of an old roadbed is, even if the repair consists in putting on a new tunnel where the roadbed needs a tunnel.

The employee repairing the engine with the new wheel is engaged in interstate commerce. So, likewise, the employee repairing the "roadbed" with a new tunnel is engaged in interstate commerce, because making its chief instrumentality more fit for use.

Operating a railroad is defendant's business, not digging tunnels, except when necessary for the better operation of the road. This tunnel was a method of improving a dangerous place in the roadbed. *It was part of the railroad business.* It is beyond cavil the tunnel is an improvement, not a railroad.

Our allegation that "plaintiff was employed by defendant in said work of driving a tunnel *to improve and better the roadbed* between Horricks Spur and Rockdale *on defendant's main railroad line*" is admittedly true.

To exclude this *tunnel improvement* from other improvements or class it by itself is to declare

that improvements to small places of danger come within the act, but places of great danger do not.

Those engaged in the department of repairs and betterments are entitled to the benefit of the act. Raymond was working in that department to improve the "roadbed." His work is included within its express terms. Congress had the power to include such work and clearly indicated that purpose. There is no reason for excluding it.

The lower courts should be reversed.

Respectfully submitted,

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RAYMOND *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 636. Argued January 31, 1917.—Decided March 6, 1917.

Plaintiff, employed by the defendant, an interstate carrier, was injured while laboring in a tunnel which was then being constructed by the defendant in the State of Washington for the purpose of shortening its main line between Chicago and Seattle and thus improving its freight and passenger service. The tunnel was incomplete and had never been used in interstate commerce.

Held, (1) That neither party was engaged in interstate commerce, *quoad* the injury, and that no cause of action existed under the Federal Employers' Liability Act.

(2) That plaintiff's cause of action, viewed as arising under the state law, was remediable only as provided by the Washington Workmen's Compensation Act, Laws 1911, c. 74. *Mountain Timber Co.* v. *Washington*, *post*, 219; *New York Central R. R. Co.* v. *White*, *post*, 188.

233 Fed. Rep. 239, affirmed.

THIS was an action for personal injuries begun in the District Court of the United States for the Western District of Washington, the petition averring that the plaintiff was a citizen of that State and the defendant a foreign corporation. The facts are stated in the opinion.

Mr. John T. Casey, with whom *Mr. Thomas J. Walsh* was on the briefs, for plaintiff in error.

Mr. Heman H. Field and *Mr. George W. Korte* for defendant in error, submitted.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Raymond, the plaintiff in error, sued the Railway Company, a foreign corporation doing business in Washington, to recover damages resulting from injuries sustained by him while in its employ. The petition alleged that the defendant operated an interstate commerce railroad between Chicago and Seattle and that for the purpose of shortening its main line and making more efficient and expeditious its freight and passenger service, was engaged in cutting a tunnel through the mountain between Horrick's Spur and Rockdale in Washington. It was averred that plaintiff was employed by the defendant in the tunnel as a laborer and that while he was at work his pick struck a charge of dynamite which through the defendant's negligence had not been removed and that from the explosion which followed he has sustained serious injuries.

The defendant's answer contained a general denial and alleged that at the time and place of the accident the railroad and Raymond were not engaged in interstate commerce, since the tunnel was only partially bored and hence not in use as an instrumentality of interstate commerce. It was further alleged that the court was without jurisdiction to hear the cause because of the provisions of the Washington Workmen's Compensation Act (Chapter 74, Laws of 1911) with whose requirements the defendant had fully complied. The reply of the plaintiff admitted the facts alleged in the answer but denied that they constituted defenses to the action.

The trial court entered a judgment for the defendant on the pleadings, and this writ of error is prosecuted to a

judgment of the court below affirming such action. 233 Fed. Rep. 239.

Considering the suit as based upon the Federal Employers' Liability Act, it is certain under recent decisions of this court, whatever doubt may have existed in the minds of some at the time the judgment below was rendered, that under the facts as alleged Raymond and the Railway Company were not engaged in interstate commerce at the time the injuries were suffered, and consequently no cause of action was alleged under the act. *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439; *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington*, 241 U. S. 177; *Minneapolis & St. Louis R. R. Co.* v. *Nash*, 242 U. S. 619.

It is also certain that if the petition be treated as alleging a cause of action under the common law, the court below was without authority to afford relief, as that result could only be attained under the local law in accordance with the provisions of the Washington Workmen's Compensation Act, which has this day been decided to be not repugnant to the Constitution of the United States. *Mountain Timber Company* v. *Washington*, *post*, 219. And this result is controlling even although it be conceded that the railroad company was in a general sense engaged in interstate commerce, since it has been also this day decided that that fact does not prevent the operation of a state workmen's compensation act. *New York Central R. R. Co.* v. *White*, *post*, 188.

Affirmed.